UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

BLOOMINGDALE'S, INC.

and Case 31-CA-071281

FATEMEH JOHNMOHAMMADI, an Individual

Michelle Scannell, Esq.,
for the Acting General Counsel.
David S. Bradshaw, Esq. (Jackson Lewis, LLP) &
David E. Martin, Esq. (Macy's, Inc.),
for the Respondent Company.
Dennis F. Moss, Esq.,
for Charging Party Johnmohammadi.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc*., 357 NLRB No. 184 (Jan. 3, 2012), petition for review filed No. 12-60031 (5th Cir. Jan. 13, 2012). The Board in that case found that D. R. Horton violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by requiring its employees, as a condition of employment, to sign an "agreement" that any and all future employment claims against the company would be determined on an individual basis by final and binding arbitration. The Board held that the mandatory arbitration "agreement" was unlawful for two reasons: (1) it did not contain an exception for unfair labor practice allegations, and thus would reasonably lead employees to believe that they could not file charges with the Board; and (2) it required employees to waive their substantive right under the NLRA to pursue concerted (i.e. classwide or collective) legal action in any forum, arbitral or judicial.

The issue in this case is whether Bloomingdale's likewise violated the NLRA, even though (1) the plan documents governing its mandatory arbitration procedure—step 4 of its so-called Solutions InStore (SIS) early dispute resolution program—explicitly excludes claims under the NLRA, but the exclusion is not mentioned in the brochures or booklets summarizing the plan; and (2) employees are provided an opportunity to affirmatively opt out of the arbitration provisions within a prescribed period after they are hired and/or notified of the plan, thereby forfeiting the ability to arbitrate any future claims, but retaining the right to pursue them in court on either an individual or a classwide/collective basis.

The case arises from a wage and hour dispute between Bloomingdale's and Fatemeh Johnmohammadi, a former sales associate at its Sherman Oaks, California store from November 2005 to November 2010. In July 2011, several months after she was terminated,

Johnmohammadi filed a class action suit against the Company in State court seeking to recover unpaid overtime and other wages under the State labor code. The Company responded by, first, removing the case to Federal district court under the 2005 Class Action Fairness Act, and, second, filing a motion with the district court on November 30, 2011 to stay the proceeding and compel arbitration. In support of the latter, the Company argued that Johnmohammadi had voluntarily agreed, by failing to opt out of the SIS arbitration provisions within the prescribed 30 days after she was hired, to resolve any future employment disputes through final and binding arbitration on an individual basis, and had thereby explicitly waived both the right to sue in court and the right to bring class claims on behalf of other employees.

Johnmohammadi opposed the Company's motion to compel arbitration. Moreover, on December 12, 2011, she filed an unfair labor practice charge with the Board's Regional Office alleging that, by invoking the SIS class action ban in the court case, the Company was unlawfully interfering with the right of employees to engage in protected concerted activities.

After considering the parties' briefs and oral arguments, by order dated February 29, 2012, the district court granted the Company's motion to compel arbitration and dismissed Johnmohammadi's suit without prejudice. However, Johnmohammadi subsequently filed an appeal with the Ninth Circuit (No. 12-55578), which remains pending. Further, on October 31, 2012, the Regional Director found merit in Johnmohammadi's unfair labor practice charge and issued a complaint against the Company. The complaint alleges that the Company has violated Section 8(a)(1) of the NLRA by maintaining and enforcing the SIS mandatory arbitration program, both because the summary descriptions of the program could lead employees to reasonably believe they are prohibited or restricted from filing unfair labor practice charges with the Board, and because the program requires employees to forgo the right to pursue their employment claims on a collective or classwide basis.

Following two pretrial conferences, a hearing on the complaint was held before me on April 2 in Los Angeles, California. The parties thereafter filed their briefs on May 7. After considering the briefs and the entire record, I find as follows.[1]

FINDINGS OF FACT

The SIS dispute resolution program was first implemented by Bloomingdale's and other stores owned by Federated Department Stores (now Macy's) effective January 2004. The governing rules and procedures are set forth in two plan documents. The first is the original 2004 Plan Document, which applied when Johnmohammadi was hired in 2005. The second is a subsequent 2007 SIS Plan Document, which applies to employees of Bloomingdale's and other Macy's divisions, subsidiaries, or related entities who were hired on or after January 1, 2007, as well as former employees of another company (May Department Stores) and its affiliates who became such employees pursuant to an August 30, 2005 merger (R. Exhs. 1, 2; Tr. 82).

[1] Commerce jurisdiction under Section 2(2), (6), and (7) of the Act is undisputed and well established. Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited.

As set forth in both plans (which are materially the same), the SIS program contains four steps. The first three steps are internal reviews by supervisors, managers, or, in some cases, peers. These steps are available to any and all employees for any and all employment-related disputes, with the exception of the third step which applies only to employment disputes involving legally protected rights.

As indicated above, the fourth and last step is final and binding individual arbitration. All employees (unless covered by a collective-bargaining agreement) also have access to this step; indeed, they have no other option if they are dissatisfied with the outcome of the third step. That is, the dissatisfied employee's only option is to take the legal claim before a neutral arbitrator,[2] who under the terms of the program may hear the case only on an individual basis, i.e., may not consolidate claims by more than one employee or hear "class actions."

However, there is an exception for employees who had previously opted out of the SIS arbitration provisions, i.e. had elected not to be covered by the arbitration provisions by executing and mailing a form to the Company's SIS office in Ohio within the prescribed time period. Claims by such an employee may not be submitted to arbitration after the third step; however, the employee is free to continue pursuing the claims in a judicial forum on either an individual or collective/class basis.

In addition, unlike the first three steps, certain types of legal claims are specifically excluded from this step. Thus, the plan documents state that claims required to be processed under a different procedure pursuant to the terms of employee pension or benefit plans, and claims for State employment insurance (e.g. unemployment compensation, workers' compensation, and worker disability compensation) or under the National Labor Relations Act are not subject to arbitration. The plan documents also state that nothing in the SIS program prohibits an employee from filing a charge or complaint with a government agency such as the EEOC, but upon receipt of a right to sue letter or similar administrative determination, the employee's claim becomes subject to arbitration.

Employees have received different notice and opportunities to opt out of the step 4 arbitration provisions depending on whether they were current employees or new hires. Employees who were already employed by Bloomingdale's or other Federated stores at the time of the initial rollout in late 2003 were notified and provided an opportunity to opt out of arbitration twice, once when the program was announced and again a year later. Former employees of May Department Stores who became employees of Bloomingdales or other Federated stores as a result of the August 2005 merger likewise received two such notices and opportunities to opt out. However, new hires such as Johnmohammadi were/are given only one notice and opportunity to opt out within 30 days of hire.

The manner in which employees have been notified of the SIS program and/or the arbitration provisions has also differed somewhat. During the initial rollout by Federated in late 2003, employees of Bloomingdale's were given a brief letter from Federated's CEO introducing the "important new benefit." This was accompanied by a 12-page brochure, which summarized

[2] There is no contention in this proceeding that the rules and procedures governing the selection of the arbitrator or the conduct of the arbitration hearing are substantively unfair.

the program and referred employees to the SIS plan document, "which governs Plan administration," for "more specific details." Employees were also shown a short video about the SIS program (which included a supportive statement by a retired Federal circuit court judge), and a poster was also displayed at each store summarizing the program. Finally, the SIS plan document itself was mailed to each employee's home, along with an "election" form that employees had to complete and mail to the SIS office, postmarked no later than October 31, 2003, in order to opt out of the arbitration provisions, i.e. to elect "not to be covered by the benefits of Arbitration." (R. Exh. 3; Tr. 94–100.)[3]

A year later, a second mailing was sent to those Bloomingdale's and other employees who did not timely return an opt-out form during the initial rollout (approximately 90 percent of Federated's 112,000 employees). Included in the mailing were another brief message about the program from Federated's CEO, a "By the numbers" newsletter and "We've got you covered" brochure summarizing the program and how well it had worked during the past year, and another election form that employees had to complete and mail to the SIS office, postmarked by November 15, 2004, in order to opt out of the arbitration provisions. The 20-page plan document itself was not again included in the mailing, but the newsletter, brochure, and election form stated that it could be found on the SIS website or received by mail on request. (R. Exh. 4; Tr. 94, 108–116, 150.)

As indicated above, following the 2005 merger, the former May Department Store employees were likewise given two opportunities to opt out. The first time in late 2006, the employees were notified in much the same way as Federated's employees in 2003. They were given a brief letter from Federated's CEO introducing them to the SIS program, accompanied by a 12-page brochure or booklet. They were also shown the video and a poster was displayed. In addition, the 2007 plan document that would cover them was mailed to their homes, along with an election form that the employees had to complete and mail to the SIS office, postmarked no later than October 31, 2006, to opt out. (R. Exh. 5; Tr. 119–121.) The second time, in late 2007, a "Program update" and "We've got you covered" brochure was mailed to them, along with another election form that they had to complete and mail to the SIS office, postmarked by November 15, 2007, to opt out. The 17-page plan document itself was not sent to them again, but the program update and election form stated that it could be found on the SIS website or received by mail on request. (R. Exh. 6; Tr. 123–124.)

As for new hires, in 2005,when Johnmohammadi was hired, the employment application form itself stated:

> Solutions InSTORE. Please note that if you are hired, you will be given thirty (30) days from your date of hire to decide if you want to participate in the fourth step of the Company's early dispute resolution program, Solutions InSTORE, which is final and binding arbitration. It is important that you read all the

[3] According to the uncontradicted testimony of the Company's witnesses, a preaddressed return envelope was always provided to employees with the election form. However, contrary to the Company's posthearing brief, there is no record evidence that the envelopes included prepaid postage.

> materials and ask any questions you have so that you are fully informed about what Solutions InSTORE has to offer.

Once hired, the new employees were also given (1) a copy of the employee handbook, which briefly described the SIS program and advised them to "refer to your Solutions InStore booklet" for "further details" on the program; (2) a 12-page SIS brochure describing the program, which in turn referred employees to "the Plan Document" for "more specific details"; and (3) an election form that they had to complete and mail to the SIS office, postmarked no later than 30 days from their hire date, to opt out of the arbitration provisions.[4] Although new employees were not given a copy of the 2004 SIS plan document, both the brochure (p. 11) and the election form stated that they could obtain a copy of it by logging onto the SIS website, requesting it from the local HR representative, sending an email to the SIS address, or calling the SIS office number. Finally, as indicated above, an SIS poster was also displayed at the stores. (Jt. Exhs. 1, 8A–E.)

Currently, new hires continue to receive a similar 12-page SIS brochure and election form. Unlike Johnmohammadi and other new hires in 2005, they are also given a hardcopy of the 2007 SIS plan document. Indeed, they are now required to execute an acknowledgement form stating that they have received a copy of both the brochure and plan document and understand that they have 30 days from hire to review the information and postmark the election form to the SIS office if they wish to be excluded from step 4. (Jt. Exh. 7; R. Exh. 7; Tr. 155–156.)

Of all the above-described past and current materials referencing the SIS program, only the 2004 and 2007 plan documents mention *both* the exclusion of claims under the NLRA *and* the ban on class actions at step 4. Several of the brochures or booklets briefly indicate that class actions are not available at step 4.[5] However, none mention the exclusion for ULP allegations. Indeed, they state that "any kind of dispute that could be heard in a court of law," including "wrongful" or "improper" terminations, are covered by steps 3 and 4, and that, unless an employee opts out of step 4, he/she agrees to use arbitration "as the sole and exclusive means to resolving any dispute" regarding employment. And the election forms, posters, video, employee handbook, Johnmohammadi's application, and current acknowledgment form, do not mention

[4] Although Johnmohammadi testified that she does not remember receiving the brochure and election form, I find that she was, in fact, given both.

[5] See, for example, the chart on the last page of the 2004 "We've got you covered" brochure (R. Exh. 4). The chart, which appears under the heading "facts about arbitration," compares "arbitration" to "litigation" with respect to various factors, including the average length of time, company cost, and employee cost. With respect to "class actions," the chart says "No" under "arbitration," and "Yes" under "litigation—without any further discussion or explanation. Thus, the chart suggests that class actions are never available or permitted in arbitration (even though this actually depends on the parties' arbitration agreement and intent, see *Oxford Health Plans LLC v. Sutter*, --- S.Ct. ----, 2013 WL 2459522 (June 10, 2013)), and are always available or permitted in litigation. Compare the more recent charts in the 2006 and 2007 brochures that were given or sent to the former May Department Store employees (R. Exhs. 5, 6), and in the current brochures given to new hires (R. Exh. 7). These charts more precisely say "Not Permitted" under "Step 4 arbitration," and under "Litigation (national perspective)," say "Permitted, but they require employees to prove that a class is proper under various legal tests."

either. In fact, similar to the brochures/booklets, the current acknowledgment form states, "if at any time I have a dispute or claim relating to my employment, it will be resolved using the Solutions InStore process described in the brochure and Plan Document."

Finally, the record indicates that relatively few employees have actually returned an election/opt-out form. As indicated above, only 10 percent of Federated's employees returned the form following the initial rollout in late 2003. And only 3 percent returned the form at the second opportunity a year later. Similarly, only 2 percent of May Department Store employees returned the form at the first opportunity in 2006 following the merger, and only 1 percent at the second opportunity in 2007. As for Bloomingdale's itself, only 3 percent of its approximately 10,000 current employees (including former Federated and May employees and new hires) have returned the election/opt-out form. (Tr. 66–67, 108, 116, 122, 125.)

ANALYSIS

I. The Exclusion of NLRA Claims

As indicated above, this case is different from *Horton* in that the governing plan documents here specifically exclude claims under the NLRA from arbitration.[6] However, this exclusion is not mentioned in any of the company brochures, booklets, or other documents summarizing or discussing the SIS program. On the contrary, both the brochures/booklets and the current acknowledgment form indicate that such claims are covered. Cf. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007) (unpub.) (statement in company memo that the arbitration policy applies to disputes that a "court of law" would be entitled to entertain could reasonably be construed by employees to include unfair labor practice allegations).[7]

In agreement with the General Counsel, I find that this conflict between the plan descriptions and the summary brochures/booklets and acknowledgment form creates an ambiguity that could reasonably lead employees to believe that their right to file unfair labor practice charges with the Board is prohibited or restricted. I further find, consistent with Board precedent, that the Company is properly held legally accountable for the ambiguity. See generally *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 3 (2012), and cases cited there. To paraphrase the Ninth Circuit in *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1145–1146 (2002), "the law should provide as strong an incentive as possible for employers to write [summary plan descriptions] so that they are consistent with [the governing plan] documents, a relatively simple task," to avoid chilling the free exercise of employee rights. Unlike under the Employee Retirement Income Security Act (ERISA), there is no legal requirement under the Federal Arbitration Act (FAA) that employers provide employees

[6] As indicated above, the plan documents here also specifically state that nothing in the SIS program prohibits an employee from filing a charge or complaint with a government agency such as the EEOC; however, upon receipt of a right to sue letter or similar administrative determination, the employee's claim becomes subject to arbitration. But see *Horton*, 357 NLRB No. 184, slip op. at 2, fn. 2 (finding similar language ambiguous).

[7] See also the Supreme Court's recent discussion of such terms in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 670 (2012).

with a summary plan description. Nevertheless, where employers do so, there is no apparent reason—and none is offered by the Company—why they should not be required to avoid inconsistencies, such as that here, that impact employee statutory rights. Indeed, to hold otherwise would encourage both ambiguity and brinkmanship, i.e., "conscious overstatements [the employer] has reason to believe will mislead [its] employees." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 620 (1969).

This does not mean that simplicity, the very purpose of a summary,[8] must be sacrificed completely to avoid violating the NLRA. At a minimum, however, mandatory arbitration plan summaries should clearly and consistently indicate that there are exceptions or exclusions, and direct employees to the governing plan document(s) to find them. Here, both the summary brochures/booklets (some of which are nearly as long and otherwise detailed as the plan documents themselves) and the acknowledgment form indicate, incorrectly, that there are no exceptions or exclusions, and only generally refer employees to the plan documents for more specific details of the SIS program. Cf. *Kummetz v. Tech Mold, Inc*., 152 F.3d 1153 (9th Cir. 1998) (employee was not contractually bound by mandatory arbitration clause in employee handbook where the acknowledgment form employee signed indicated that the handbook did not constitute a contract and did not specifically mention the arbitration clause).

Accordingly, I find that the Company has violated Section 8(a)(1) of the NLRA by maintaining and distributing to employees the overbroad SIS summary brochures/booklets and acknowledgment form, as alleged.

II. The Class Action Ban

As indicated above, this case is also different from *Horton* in that the Bloomingdale's mandatory arbitration provisions permit employees to opt out of arbitration altogether, and thereby preserve their right to pursue future claims in court on either an individual or collective/class basis. The Company argues that this is a significant difference because, as found by numerous Federal and State courts, it renders the SIS arbitration procedure truly voluntary.[9] The Company argues that this case therefore squarely presents "the more difficult question" that the Board in *Horton* expressly left open in footnote 28 of its decision:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.[10]

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[8] *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1877–1878 (2011). See also *CompuCredit*, 132 S.Ct. at 671–672.

[9] The Company's posthearing brief cites numerous Federal and State court decisions finding employee assent in these circumstances, including *Quevedo v. Macy's, Inc.,* 798 F.Supp.2d 1122 (C.D. Cal. 2011); *Outland v. Macy's Dept. Stores*, 2013 WL 164419 (Cal. Ct. App. Jan. 16, 2013) (unpub.), and 13 additional, unpublished decisions involving the same Macy's/ Bloomingdale's SIS arbitration program involved here.

[10] See also footnote 18 of the *Horton* decision, distinguishing *Webster v. Guillermo Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (unpub.).

The Company submits that this question must be answered in the affirmative, and that the SIS arbitration/opt-out provisions be found lawful, consistent with both the FAA, which "reflects an emphatic federal policy in favor of arbitration," *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Pllymouth, Inc*., 473 U.S. 614, 631 (1985), and the NLRA, which protects employee rights to engage in and "to refrain from" concerted activities, *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 3223, 324 (1974), quoting Section 7 of the NLRA, 29 U.S.C. § 157.[11]

The General Counsel and Johnmohammadi, on the other hand, argue that the difference is of no legal significance. They argue that the opt-out opportunity does not render the SIS program truly "voluntary," at least with respect to new hires, as it is only available within the initial 30 days of hire, a time when they are not likely to have any awareness of employment issues or their rights under the NLRA to engage in collective legal and other concerted activity. They further argue that the opt-out procedure places an unlawful burden on employees, both by requiring them to take affirmative steps to regain or preserve those rights, and by requiring them to do so openly—i.e. to "publicly self-identify" their unwillingness to go along with the Company's preferred, nonjudicial and noncollective, dispute resolution procedure—at a "highly vulnerable time when they are new employees." GC Br. 15–16 (citing *Special Touch Home Care Services*, 357 NLRB No. 2, slip op at 7 (2011) ("a requirement of individual notice is . . . an impediment to Section 7 activity"), affd. on point but enf. denied on other grounds 708 F.3d 447 (2d Cir. 2013)).

Moreover, they argue that upholding the SIS opt-out procedure would be inconsistent with Board precedent finding unlawful and unenforceable employee separation agreements that waive or "trade away" the employee's right to engage in future concerted activity. See *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), quoting *Mandel Security Bureau*, 202 NLRB 117, 119 (1973). As pointedly stated by Johnmohammadi, the "voluntariness of the waiver herein [is] irrelevant." Rather,

> the core issue is whether or not Bloomingdale's can buy, with any consideration, such as a raise, arbitration promise, a job, or a decent parking space in the

[11] The Company additionally or alternatively argues that *Horton* was wrongly decided, noting that the Eighth Circuit and most lower courts have declined to follow it to date. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Miguel v. JPMorgan Chase Bank*, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Carey v. 24 Hour Fitness USA, Inc.,* 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012), and cases cited therein. See also *Walthour v. Chipio Windshield Repair, LLC*, --- F.Supp.2d ----, 2013 WL 1932655 (N.D. Ga. Feb. 27, 2013) (finding *Horton* persuasive, but requiring the parties to proceed with individual arbitration anyway given the judicial trend upholding class waivers and the strong presumption in favor of arbitration). However, I am bound by Board precedent unless and until it is reversed by the Supreme Court. See *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004). The Company also challenges both *Horton* and the instant proceeding for lack of a valid Board quorum, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for certiorari granted, No. 12-1281 (June 24, 2013). However, the Company's prehearing motion to dismiss the complaint on this ground was denied by the Board on April 30, 2013 (359 NLRB No. 113). Again, I am bound by the Board's ruling.

> employee parking lot, an employee's agreement not to engage, in the future, in concerted activity.
> . . . .
>
> Obviously, a voluntary agreement between an employer and an employee, wherein the employee agrees not to join a union in the future for $1,000, would run afoul of the [Norris LaGuardia Act] and NLRA. There is no analytical reason to hold otherwise if, in exchange for the "benefits" of arbitration, instead of $1,000, an employee agrees not to engage in the future in a concerted activity other than joining a union—agrees, for example, not to pursue concerted litigation, not to join with others in a judicial forum, or other forum to litigate wage claims [CP Br. 3, 25].

Having carefully considered the parties' arguments and cited cases, in agreement with the Company, I find that the opt-out procedure is sufficient to render the individual arbitration program voluntary. While the Company's overall SIS presentation has consistently been one-sided,[12] neither the General Counsel nor Johnmohammadi contend that the Company has failed to adequately notify employees about the class action ban. Further, at least some of the SIS brochures have encouraged employees to educate themselves about both "the benefits and limitations of arbitration," and provided them with the website address of the American Arbitration Association to find more information. See R. Exhs. 5 and 7. Moreover, new hires have been given 30 days in which to do so, a not insubstantial or unjustifiable period of time. Cf. *California Saw & Knife Works*, 320 NLRB 224, 235 (1995) (generally approving of 30-day deadline for nonmember employees to object to, and thereby opt out of, paying fair-share union fees for noncollective bargaining activities); reaffirmed on point in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB No. 164, slip op. at 4 fn. 11 (2011), vacated as moot 487 Fed. Appx. 661 (2d Cir. 2012) (unpub.). To paraphrase the Seventh Circuit in *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996), cert. denied 117 S.Ct. 1426 (1997), "life is full of deadlines, and [there is] nothing particularly onerous about this one." See also *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-2000 (9th Cir. 2002) (mandatory arbitration agreement was not procedurally unconscionable because it only allowed employees to opt out during the first 30 days of employment). Finally, there is no allegation or record evidence that the Company has threatened employees with reprisals or retaliated against them for opting out. Cf. *Circuit City Stores v. Mantor*, 335 F.3d 1101 (9th Cir. 2003), cert. denied 124 S.Ct. 1169 (2004) (finding arbitration agreement procedurally unconscionable where the employer threatened employee's job if he opted out).

I also reject the General Counsel's and Johnmohammadi's argument that the opt-out procedure unlawfully burdens employees. A one-time requirement that employees sign and post a preprinted election form, by regular mail in a preaddressed envelope, seems a minimal administrative burden, and no authority is cited holding otherwise. As for the possibility that new employees in particular would be reluctant to opt out due to fear of retaliation, this is certainly a reasonable concern given the Company's clearly stated preference for arbitration.[13] However, as indicated by the Company, the SIS mail-in procedure addresses this concern by

[12] See, e.g., *Quevedo*, 798 F.Supp.2d at 1136.

[13] See id. at 1137–1138.

having employees return the form remotely and impersonally to the corporate SIS office, rather than directly and personally to their immediate store supervisor or manager.[14] Moreover, there would be no less reason for employees to fear retaliation with an opt-*in* procedure; either way the Company would know whether employees had elected "not to be covered by the benefits of arbitration." Thus, if the General Counsel's and Johnmohammadi's argument were adopted, employers could never lawfully offer an arbitration agreement to an employee, no matter how beneficial or whether it covered one dispute or all disputes, that waived the employee's right to pursue class litigation.

As for the General Counsel's and Johnmohammadi's argument that *Ishikawa* prohibits trading away Section 7 rights in this manner, if the answer were so simple the Board's comment in *Horton* that voluntary agreements presented a "more difficult question" would have to be considered gratuitous. Certainly, the Board was well aware of its decision in *Ishikawa*; indeed, another case was pending before the Board at that time raising a similar issue. See *Goya Foods of Florida*, 358 NLRB No. 43 (May 17, 2012) (citing *Ishikawa* in disapproving a settlement agreement in which the two alleged discriminatees each received over $20,000 in exchange for, among other things, agreeing not to engage in any union activity related to the employer's employees).[15]

What makes the issue here "more difficult" is that there is no "emphatic federal policy" in favor of employees getting severance pay, a raise, or a parking space. As indicated by the Company, there is, on the other hand, such a policy in favor of arbitrating disputes. In short, arbitration is not just any benefit; it is a federally favored and supported benefit. The question, therefore, is whether it is a benefit of such overriding Federal importance that the Board must or should look away when employees voluntarily enter into mandatory arbitration agreements, even

[14] The same concerns might be met by affording employees the even easier and faster option of making their election online, through the SIS website. Indeed, the Company has admittedly required new hires to sign the acknowledgement form online since 2007, using their social security number and other identifying information, "so that it could be more easily done and recorded" (Tr. 137–138). However, neither the General Counsel nor Johnmohammadi argue that the availability of such an alternative renders the mail-in requirement unduly burdensome. And I would not reach this conclusion on this record in any event.

[15] Recent administrative law judge decisions relying on *Ishikawa* to invalidate similar arbitration/opt-out provisions are distinguishable. Each of the decisions also relied heavily on the fact that the arbitration policies expressly forbade employees who participated in arbitration (i.e., employees who had not opted out) from disclosing to other employees the existence, content, or results of any arbitration without the written consent of all parties. See *24 Hour Fitness USA, Inc*., JD(SF)–51–12, 2012 WL 5495007 (Nov. 6, 2012), respondent's exceptions filed Jan. 3, 2013; and *Mastec Services*, JD(NY)–25–13, 2013 WL 2409181 (June 3, 2013). Although the SIS plan documents here also contain confidentiality provisions (R. Exh. 1, p. 14; R. Exh. 2, p. 13), which are arguably objectionable as well (see *Teimouri v. Macy's, Inc*., 2013 WL 2006815 at *32–34 (Cal. App. May 14, 2013) (unpub.)), neither the General Counsel nor Johnmohammadi rely on this as support for finding the arbitration provisions unlawful. In any event, administrative law judge decisions (including this one) lack precedential authority unless and until reviewed and affirmed by the Board.

if they are conditioned on employees completely and irrevocably relinquishing their right under the NLRA to engage in collective legal action against their employer.

The General Counsel and Johnmohammadi provide no real answer to this question. Rather, they simply recite the Board's reasoning in *Horton*, i.e., that concerted activity is a substantive right and the Supreme Court's opinions indicate that arbitration agreements may not require a party to forgo such rights. However, again, if the answer were so straightforward, there would be nothing "more difficult" about this case than *Horton*.

Moreover, as indicated above, there could be very real and adverse consequences, not only for existing arbitration agreements, but also for future agreements, if the position of the General Counsel and Johnmohammadi here were adopted. Thus, employers might no longer offer arbitration agreements to employees if they are unable thereby to avoid future class action litigation in court. This concern could be addressed by requiring only that such voluntary agreements permit employees to pursue class claims in arbitration. However, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S.Ct. 1758, 1776 (2010). Further, arbitration is "poorly suited" for class claims. *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1753 (2011). See also *American Express Co. v. Italian Colors Restaurant*, --- S. Ct. ----, 2013 WL 3064410 (June 20, 2013). Thus, while small companies with only 20–25 employees might be willing to live with this alternative (see *Horton*, 357 NLRB No. 184, slip op. at 11–12), it is unlikely that large corporations with thousands of employees such as Bloomingdale's and its parent Macy's would be (see *AT&T*, 131 S.Ct. at 1752).

Accordingly, for all the foregoing reasons, I find that the General Counsel has failed to carry the burden of proof and/or persuasion, and that the Company therefore did not violate Section 8(a)(1) of the NLRA by maintaining and enforcing against Johnmohammadi the individual arbitration provisions of the SIS plan.[16]

CONCLUSIONS OF LAW

1. By maintaining and distributing, since at least June 2011, summary descriptions of the Solutions InStore dispute resolution plan that would reasonably lead employees to believe that their right to file unfair labor practice charges with the Board had been eliminated or restricted, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the NLRA.

2. The Company has not otherwise violated Section 8(a)(1) of the NLRA by maintaining and enforcing against Charging Party Johnmohammadi the individual arbitration provisions of the Solutions InStore plan since June 2011.

[16] In light of this finding, it is unnecessary to address the Company's various affirmative defenses to these allegations.

REMEDY

The appropriate remedy for the violation found is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, the Company shall be required to rescind or revise the Solutions InStore summary brochures/booklets and acknowledgment form to be consistent with the governing SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and the right of employees to file charges with the Board. In addition, the Company shall be required to notify employees that this has been done and to also post a notice regarding the violation. Finally, because the SIS brochures/booklets and acknowledgment form containing the overbroad language are used on a corporatewide basis, the Company shall be required to take these actions at all of its stores where the SIS program is in effect. See *Horton*, 357 NLRB No. 184, slip op. at 13; and *U-Haul of California*, 347 NLRB at 375 fn. 2.

Accordingly, based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Bloomingdale's, Inc., Sherman Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or distributing to current or new employees summary descriptions, including but not limited to brochures, booklets, or acknowledgment forms, regarding the Solutions InStore (SIS) dispute resolution plan, which would reasonably lead employees to believe that their right to file unfair labor practice charges with the Board had been eliminated or restricted.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the SIS brochures/booklets and acknowledgment form to be consistent with the SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and the right of employees to file charges with the Board.

(b) Notify employees of the revisions or rescissions by providing them with a copy of the revised SIS brochures/booklets and acknowledgment form, or by specifically notifying them that the SIS brochures/booklets and acknowledgement form have been rescinded for the reasons set forth in this decision and order.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility in Sherman Oaks, California, and any other facility where the SIS brochures/booklets and acknowledgment form have been used, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 25, 2013

Jeffrey D. Wedekind
Administrative Law Judge

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or distribute summary descriptions, including but not limited to brochures, booklets, or acknowledgment forms, regarding our Solutions InStore (SIS) dispute resolution plan, which would reasonably lead you to believe that your right to file unfair labor practice charges with the Board had been eliminated or restricted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act (NLRA).

WE WILL rescind or revise the SIS brochures/booklets and acknowledgment form to be consistent with the SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and your right to file charges with the Board.

WE WILL notify you of the revisions or rescissions by providing you with a copy of the revised SIS brochures/booklets and acknowledgment form, or by specifically notifying you that the SIS brochures/booklets and acknowledgement form have been rescinded for the reasons set forth in the Board's decision and order.

BLOOMINGDALE'S, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.